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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CLAIRE LEVINE, Plaintiff and Appellant, v. FRIEDMAN & FRIEDMAN et al., Defendants and Respondents.	B195856 (Los Angeles County Super. Ct. No. BC324179)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert L. Hess, Judge. Affirmed.

Coggan & Tarlow, Jay M. Coggan, David N. Tarlow, and Joshua G. Blum; Law Offices of Joseph W. Singleton and Joseph W. Singleton, for Plaintiff and Appellant.

Berman, Berman & Berman, James W. McCord and William M. Aitken, for Defendants and Respondents.

Plaintiff Claire Levine appeals from the summary judgment entered for defendants Cynthia Bleifer, Ira Friedman, and the law firm Friedman & Friedman in this action for legal malpractice.[1] We affirm.

FACTS AND PROCEDURAL HISTORY

Claire and Barry Levine divorced in 1986. In 1989, Barry stipulated to the entry of a family law judgment that obligated him to pay child support, summer camp fees, and private school tuition for their two children until they turned 19 in, respectively, June 1998 and September 2003. Barry made few such payments and in 2003, Claire hired the law firm of Friedman & Friedman to help her collect what Barry had failed to pay. Friedman brought two motions on Claire's behalf to determine how much Barry owed – one aimed at child support and the other at the unpaid camp fees and school tuition.[2]

The support motions were argued over three days of hearing. For the camp fees and tuition, Claire's declaration summarized by year and by schools and camps attended the costs of those various institutions. The total amount she claimed Barry owed was $301,447. As to each category of school and camp, Claire's declaration stated that Barry had not paid the amounts, but did not affirmatively and expressly state that she had paid those amounts or any amount. The closest she came was in reference to one school her son attended, stating "My total costs for Crossroads was $116,725." Attached to her declaration were letters from Crossroads school stating what it charged for tuition during the relevant years, and one letter from Camp Manitou stating that $26,235 had been paid for Jeremy's camp expenses from 1990 through 1996. The camp letter did not state who paid those expenses, however.

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[1] Bleifer and Ira Friedman were lawyers in the law firm. When we refer to Friedman, we mean the firm and these two individual defendants. Other named defendants – Gail S. Green and Robin T. Robinson – were long ago dismissed from the action and are not parties to this appeal.

[2] For ease of reference, we will sometimes refer to the child support motion and the camp fees and tuition motion as the support motions.

The record includes only excerpts from the support motions hearing transcripts and nowhere in those portions before us does it appear that Claire ever testified about the source of any camp and tuition payments. However, an appellate court decision arising from the support motions supplies more detail as to how the issue arose.[3] According to that decision, Claire testified in accordance with her declaration, but never said she had paid the tuition or camp fees. She could not tell the court how much had been paid and offered no supporting documents apart from those attached to her declaration. When Barry's lawyer suggested on cross-examination that Claire never made a single payment for camp or school, she testified that with a few exceptions she always made the payments, but did not have records because she did not keep checks or check registers. Finally, according to the appellate court's statement of facts, Claire conceded that others had paid the camp fees and tuition, including Jay Coggan, her former lawyer who she once dated, someone named Richard Leroy, who she did not identify, and her longtime cohabitant of 18 years, Jerry Goldstein.[4]

In response to Bliefer's questioning of the underlying support motion hearing, Goldstein testified he paid for the children's school, medical, psychiatric care, tutors, camps, and "[p]retty much whatever else you have to pay to raise kids, I paid it." Goldstein testified that he had an understanding with Claire that she would pay him back. On cross-examination, Goldstein defined that agreement as one for repayment from Claire when she received money from Barry. The agreement was not in writing and he never consulted a lawyer about the agreement. Asked if he would ever sue Claire to enforce the agreement, Goldstein hedged, saying he did not know and would make it known "[w]hen we get to that point." Apart from summaries she prepared, Claire had no evidence in the form of cancelled checks or other documents that showed the amount or

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3 See decision *post*.

4 The limited record before us does not include portions of the hearing transcript where Claire gave that testimony.

source of any camp and tuition payments. According to Claire, some of those matters were documented, but the evidence was lost during a 1999 fire at her home.

During the second day of the support hearing, the camp and tuition motion was denied for two reasons: (1) Claire's inability to produce any records or cancelled checks showing that payments were either made by her or that she was the source of any payments by others; and (2) Claire and the children had lived for many years with Goldstein, who testified that he made the payments, but was unable to show any binding agreement for Claire to repay him.

As for the child support portion of the support motion hearings, Barry's opposition papers argued that Claire had waived her right to child support by way of numerous, repeated statements that she did not want the money. This was supported by the declarations of Barry and two of his and Claire's mutual acquaintances – Gerald Kaplan and Patti Dodge. Kaplan's declaration referred to a 1992 social gathering where Claire said she did not want Barry's money while Dodge's described a similar statement at a 2000 social gathering. Dodge and Kaplan testified at the hearing, and Claire countered with testimony that they were lying.[5] Claire also strenuously denied ever telling Barry she did not want him to pay child support and claimed that she had insisted on payment many times, but relented in the face of occasional partial payments by Barry or due to his repeated assurances that payment would be coming when he finally inherited from his parents.

After the second day of hearing, Friedman reminded Claire that she owed more than $30,000 in unpaid legal fees and warned that she should retain other counsel if she would not pay those fees. Claire responded by substituting in the law firm of Trope & Trope (the Trope firm), which represented her at the third day of hearing. During that final session, the trial court denied the child support motion as to the years 1989 through 1997 because it found Claire had waived those payments by statements to Barry that she did not want or need his money and by her failure to take steps to enforce the obligation

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[5] Dodge's and Kaplan's testimony at the hearings is not in the record, but the record does include Claire being asked about their testimony, then denouncing them as liars.

during that period. The court found that Claire began asserting her rights to the child support payments after 1997, however, and awarded her $83,750 plus interest for payments owed after that time.

The order denying Claire the camp fees and tuition was affirmed by Division One of this court. (*Levine v. Levine* (Dec. 3, 2004, B172368) [nonpub. opn.] (*Levine I*).) The order regarding child support was later affirmed by the same court. (*Levine v. Levine* (July 11, 2005, B176352) [nonpub. opn.] (*Levine II*).)

Claire then sued Friedman for malpractice in a single cause of action alleging that Friedman failed to perform adequate discovery, prepare her to testify at the hearings, offer available evidence, and otherwise failed to anticipate the issues that arose during the hearing and obtain the evidence needed to support Claire's motions. Friedman moved for summary judgment, contending that Claire could not show that any negligence by Friedman was the proximate cause of the rulings on the two support motions. Specifically, Friedman contended that Claire could not show that the evidence she alleged should have been presented or had been mishandled and poorly presented either existed or would have made any difference in the outcome.[6] The trial court agreed, granted the motion, and entered judgment for Friedman.

STANDARD OF REVIEW

Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) In reviewing an order granting summary judgment, we must assume the role of the trial court and redetermine the merits of the motion. In doing so, we must strictly scrutinize the moving party's papers. The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. While the appellate court must review a summary

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[6] Although the effect of Friedman's motion is to essentially concede that it was negligent, Friedman's motion disputed that issue as well.

judgment motion by the same standards as the trial court, it must independently determine as a matter of law the construction and effect of the facts presented. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subds. (o)(2) & (p)(2).) If the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of fact exists as to that cause of action or defense. In doing so, the plaintiff cannot rely on the mere allegations or denial of his pleadings, "but, instead, shall set forth the specific facts showing that a triable issue of material fact exists . . . ." (*Id.*, subd. (p)(2).) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.)

DISCUSSION

1. Proximate Cause Principles in Legal Malpractice Actions

A plaintiff suing for legal malpractice must show that the lawyer breached his duty of care, resulting in injury that was proximately caused by the lawyer's neglect. (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 396.) The test of proximate cause in this context is sometimes referred to as the "but for" or the "substantial factor" test. Regardless of the name used, proximate cause does not exist if the plaintiff's harm would have been sustained regardless of the lawyer's breach of duty. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240 (*Viner*).) In other words, the plaintiff must show that but for the lawyer's alleged negligence, the plaintiff would have obtained a more favorable judgment or settlement in the action where the malpractice allegedly occurred. "The purpose of this requirement, which has been in use for more than 120 years, is to safeguard against

speculative and conjectural claims. [Citation.] It serves the essential purpose of ensuring that damages awarded for the attorney's malpractice actually have been caused by the malpractice. [Citation.]" (*Id.* at p. 1241.)

An example germane to this case can be found in *Sukoff v. Lemkin* (1988) 202 Cal.App.3d 740 (*Sukoff*). There, the plaintiff sued her lawyer for malpractice, claiming his negligence in preparing the case and obtaining the required evidence led the family law court to undervalue her share in her ex-husband's assets. The Court of Appeal reversed a jury award to the plaintiff and the trial court's order denying a defense motion for judgment notwithstanding the verdict. The appellate court reasoned the plaintiff had failed to produce the evidence that she said her former lawyer should have obtained in the underlying action. Because the plaintiff was obliged to retry the underlying action, she had the burden to establish that additional discovery would have resulted in a higher award to her. Accordingly, she needed to produce at the malpractice trial the evidence she claimed her lawyer negligently failed to uncover. (*Id.* at pp. 744-745.) Her failure to produce the documentary evidence she claimed her lawyer missed (which presumably would have been discoverable in the malpractice action) was fatal to her proof that the lawyer's neglect was the proximate cause of the lower property valuation. (*Id.* at pp. 746-748.)

2. *Summary Judgment Was Proper As to the Child Support Ruling*

Claire contends there are triable issues of fact that the following missteps by Friedman proximately caused the trial court to find that she had waived child support from Barry from 1989 through 1997: (1) the failure to depose social friends Dodge and Kaplan; (2) the failure to call as rebuttal witnesses on that issue both Jerry and one of Jerry's former employees, Susan Garfield, who would testify that she worked out of Jerry's home for several years, frequently heard Claire arguing with and demanding of Barry that he pay child support, and never heard Claire say she did not want Barry's money.

As to the failure to depose Dodge and Kaplan, Claire does not contend, and there is no way to know, whether their depositions would have produced any evidence to impeach or otherwise cast doubt on their testimony. Further, the record does not show that their testimony was ever produced as part of the summary judgment hearing and there is no way to examine and evaluate how they testified and how they were cross-examined by Friedman. Finally, Dodge's evidence was apparently limited to the year 2000, and is therefore irrelevant because the trial court found no waiver during that period. Because of this, we hold that proximate cause from the failure to depose those witnesses is speculative and conjectural, and that without evidence of how depositions affected the outcome, Claire cannot show that this omission was a proximate cause of her damages.[7]

As for failing to call Susan Garfield and Goldstein as rebuttal witnesses on the waiver issue, we first hold that it is entirely speculative how the trial court would have evaluated that evidence, which merely corroborated Claire's emphatic denials that a waiver occurred. While it is true that causation is ordinarily a question of fact in these cases (see *Dawson v. Toledano*, *supra*, 109 Cal.App.4th at p. 397), we also note that Claire must show that a different result was more likely than not, and cannot depend on speculative evidence. (*Viner*, *supra*, 30 Cal.4th at pp. 1241, 1244.) The effect, if any, from testimony by Garfield and Goldstein falls squarely into that category, however.

We alternatively affirm because Friedman showed that the Trope firm took over the third and final day of the support motion hearings and was responsible from that point on for putting on any necessary rebuttal witnesses. Trope's failure to do so cut off Friedman's liability. (*Stuart v. Superior Court* (1992) 14 Cal.App.4th 124, 127-128.) Claire counters in her opposition statement of disputed fact that her Trope firm lawyer, Ronald Rale, was prevented from putting on rebuttal witnesses because the court found

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[7] The record shows that Friedman in fact subpoenaed Dodge and Kaplan in order to depose them. Friedman claims that with Claire's consent, the depositions did not take place because Dodge and Kaplan lived more than 75 miles from Los Angeles. Claire contends she was unaware of that fact.

that the issue was not raised by Claire as part of her case-in-chief. However, the record shows that further examination of *Barry* was precluded because it exceeded the scope of direct examination by *Barry*'s lawyer.

Regardless, the declaration from successor lawyer Rale in fact states (and the record shows) that he asked the court to allow further examination of Goldstein only on rebuttal on the waiver issue, and did not mention Susan Garfield.[8] Nothing in Rale's declaration or the relevant portions of the hearing transcript he relied upon show that anything the Friedman firm did or did not do during the first two days of hearing played a part in the absence of rebuttal testimony by Goldstein. Instead, the record shows that the court was hesitant about allowing the evidence, said it would listen to Rale's argument, appeared to rule that the partial waiver occurred, then recessed for ultimately unsuccessful settlement talks. Seven days later, Rale brought up the issue again during a phone conference, and the court declined to hear rebuttal testimony.

Based on this, we conclude that there were no triable issues that Friedman's alleged breaches of duty caused the trial court to make its waiver finding on the child support issue.

3. *Summary Judgment Was Proper As to the Camp Fees and Tuition Ruling*

Claire contends that Friedman should have obtained and introduced evidence from her, Goldstein, Coggan, and accountant Richard Leroy showing that payments for camp and school tuition came from her through them. She also contends Goldstein should have been better prepared to describe his repayment agreement with her in order to show it was enforceable.

As to the first category, despite the approximately two and a half year lapse of time from the support motion hearings in the underlying family law case and the hearing on the summary judgment motion in the malpractice action, Claire still failed to present any of the missing documentary evidence that she contends Friedman should have

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[8] Nor is there any evidence in the record to suggest that Friedman knew or should have known that Garfield existed as a potential rebuttal witness.

presented. In fact, Goldstein testified at his September 2005 deposition that he had obtained numerous disorganized files from accountant Leroy, and he did not know what they contained and had yet to go through the boxes. He also testified that he could not state how much he had paid for the children's camp and tuition, could recall only two of the several banks where he once maintained accounts, had been unable to find any of the checks he supposedly wrote, then testified he was "not sure if I wrote the checks or not. I can't remember which -- and that is one of the problems that I have had in trying to find it is which accounts the checks came out of . . . ." He also testified that he had begun looking through his old files for the information just a few months earlier, kept pushing his employees to complete the search, and intended to have them do so. Despite this, no such evidence was produced at the summary judgment hearing nearly nine months later. Asked about payments by Coggan, Goldstein testified that "Leroy would have made the payment because -- he wasn't making the payment. He was writing the check on behalf of me. That is why he would make the payment." Not only is this testimony so evasive and ambiguous that it fails to meet the evidentiary requirements of *Sukoff*, *supra*, 202 Cal.App.3d 740, it seems to contradict Claire's assertion that Leroy and Coggan were making payments for *her* with *her* funds.

The record does include a one-page excerpt from Coggan's deposition that appears to state that he wrote some checks to one school.[9] However, there are no declarations with supporting documentary evidence from Coggan or Leroy describing the source or amount of payments either one might have made for the Levine children's camp fees and tuition. Accordingly, under the rationale of *Sukoff*, we hold that there are no triable issues of fact to show that Friedman's alleged failures in regard to this evidence was the proximate cause of the trial court's ruling on the camp fees and tuition motion.

As for Goldstein's testimony about the nature of his repayment agreement with Claire, he stated in his summary judgment opposition declaration that he was not prepared to testify on that subject and that Bleifer did not ask him to explain that Claire

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9 Coggan has been Claire's lawyer throughout this action.

was still responsible for all sums paid by him for the camp and tuition costs. This is squarely refuted by the support motion hearing transcript, where Bleifer in fact asks him to state whether there was an understanding about repayment. Furthermore, his declaration adds little to his vague trial testimony, clarifying only that he paid some expenses as repayment for money loaned him by Claire, and that the rest was to be repaid by Claire once she received money. Finally, he gave yet another vague description during his deposition, stating only that "[t]here was an understanding that eventually it would balance out in one way or another but there is nothing in writing and . . . ." In short, given the vague and somewhat shifting nature of Goldstein's subsequent explanations, and their insignificant differences from his trial testimony, we conclude that nothing Friedman did or failed to do appears to have affected Goldstein's ability to describe and define his purported repayment agreement with Claire.

We alternatively hold that Claire has waived this issue because she has failed to discuss at all whether any of Goldstein's differing versions amounted to a legally enforceable agreement for repayment. As a result, we deem the issue waived. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.)

4. *Claire's Remaining Assertions Do Not Warrant Reversal*

Claire challenged the summary judgment ruling on several other grounds: (1) Friedman and the trial court improperly relied on the res judicata effect of the appellate court rulings in *Levine I* and *Levine II*, leaving Friedman to rely on the appellate court's affirmation of the evidentiary defects created by Friedman; (2) the motion did not address each individual act of negligence alleged in the complaint, such as the failure to propound interrogatories and the failure to develop adequate legal arguments; and (3) the motion addressed only the lack of evidence about camp and tuition payments by Goldstein and did not mention Coggan or Leroy. We take each in turn.

First, we agree that the appellate court's rulings in *Levine I* and *Levine II* that uphold the family law court's evidentiary findings do not absolve Friedman of liability. However, even though the trial court in this action appears to have relied in part upon the

supposed res judicata effect of *Levine I* and *Levine II*, we do not. Instead, our analysis and holdings are based solely upon our evaluation of the evidence contained in the record before us.

Second, Claire's complaint alleged a general failure to perform various tasks, but did not specify what those failures were or how they led to the adverse rulings on her support motions. It was through discovery that Friedman learned the true basis of Claire's cause of action, which, despite the numerous generalized acts of neglect alleged, boiled down to the failure to present certain evidence or to prepare her and Goldstein to testify about certain matters. Under *Sukoff*, *supra*, 202 Cal.App.3d 740, Friedman was obliged to show that Claire could not produce the evidence she said was missing and, under *Viner*, *supra*, 30 Cal.4th 1232, Friedman was obliged to show that the other claimed acts of negligence were too speculative to show that a different result was more likely than not. Friedman's motion made a prima facie case on those points, shifting the burden back to Claire. Her opposition (and her appellate briefs) do not explain how any of the asserted breaches of duty apart from those we have examined had any effect on the outcome.

Third, even though Friedman's separate statement of undisputed facts did not mention Coggan or Leroy by name, it did state that Claire failed to respond to Friedman's prehearing request that she provide it with all documentation supporting her camp and tuition reimbursement claims. We believe this was sufficient to raise the issue as to Coggan and Leroy.

DISPOSITION

For the reasons set forth above, the judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, Acting P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.